INDEX.

	Page.
Statement	1
The petition	1
The specifications	11
The contract	15
The supplemental contract	18
Findings	19
Finding II	19
Finding III	24
Finding IV	26
Finding V	27
Finding VI	28
Finding VII	30
The judgment of the Court of Claims	31
Assignment of errors	32
Brief of argument	32
Argument:	
I. There was no misrepresentation	32
(*a*) There was no misrepresentation in fact	32
(*b*) There was no misrepresentation in law	37
This case is governed by *Simpson* v. *U. S.*, 172 U. S., 372, and similar cases	43
II. Even had there been misrepresentation, claimant, by electing to proceed with the contract, ratified it and is estopped	48
III. By the finding of facts and the act defining its jurisdiction, the Court of Claims, if it has jurisdiction at all, is precluded from applying the measure of damages it applied in this case	56
Conclusion	60

CITATIONS.

Ball Engineering Co. v. *White & Co.*, 250 U. S., 46	57
Basso v. *United States*, 239 U. S., 602	57
Christie v. *United States*, 237 U. S., 234	43
Day v. *United States*, 245 U. S., 159	48
Dermott v. *Jones*, 2 Wall., 1	48
Gibbons v. *United States*, 8 Wall., 269	56
Gregg et al. v. *Megargel*, 254 Fed., 724	52
Grymes v. *Sanders*, 93 U. S., 55	52
Hollerbach v. *United States*, 233 U. S., 165	43
International Contracting Co. v. *Lamont*, 155 U. S., 303	55
Juragua Iron Co. v. *United States*, 212 U. S., 297	57
Kingman v. *Stoddard*, 29 C. C. A., 413; 85 Fed., 740	52

	Page.
McLean v. *Clapp*, 141 U. S., 429	52
Morgan v. *United States*, 14 Wall., 531	56
Oregonian Railway v. *Oregon Railway*, 10 Sawyer, 464	55
Phoenix Bridge Co. v. *United States*, 211 U. S., 188	48
Pomeroy's Equity Jurisprudence, vol. 2, sec. 916, 4th ed	51
Richardson v. *Lowe*, 149 Fed., 625	52
Ripley v. *Jackson, etc.*, 221 Fed., 209	52
Schillinger v. *United States*, 155 U. S., 163	57
Shappirio v. *Goldberg*, 192 U. S., 232	52
Simon v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed., 573	52
Simpson v. *United States*, 172 U. S., 372	43
Smith v. *Bolles*, 132 U. S., 125	57
Southern Development Co. v. *Silva*, 125 U. S., 247	37
United States v. *Behan*, 110 U. S., 338	58
United States v. *Spearin*, 248 U. S., 132	43
United States v. *Stage Company*, 199 U. S., 414	43

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, APPELLANT,
v.
ATLANTIC DREDGING COMPANY, W. B. Brooks, agent. } No. 214.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an appeal by the Government from a judgment of the Court of Claims allowing appellee, who had partly performed its contract and then repudiated it on the claim of misrepresentation, damages of $211,050.09 for its loss. The contract was entered into December 18, 1912, and called for certain dredging in the Delaware River below Philadelphia. The case can be best stated by setting forth the pertinent portions of the petition and the finding of facts.

THE PETITION.

The petition, in substance alleges that the claimant, who was engaged in the business of a general contractor, in response to an advertisement of the United States that it would receive bids for certain

dredging in the Delaware River, being desirous of bidding upon said work, applied to the contracting officer of the United States and was furnished with specifications, and that after examining the specifications it decided to and did bid for a certain portion of the work, namely, that designated in subdivision (3) of paragraph 16 of the specifications (R. 13) as the "lower end of Mifflin Range, connecting range, and upper end of Tinicum Range." That "claimant had no knowledge or information of its own at that time, except the general impression that the material in the channel of the Delaware River in that neighborhood was generally soft mud." (R. 2.) That it would have been impossible for claimant to have made any examination of the channel of the river where dredging was to be done in order to ascertain for itself the character of the material to be dredged, and that the Government knew this. That for information as to material to be dredged, claimant was referred to paragraph 27 of the specifications (R. 2, 16, 17), which is as follows: [Unless otherwise noted, italicization throughout this brief is ours.]

> 27. The material to be removed is *believed* to be *mainly* mud, or mud with an admixture of fine sand, except from Station 54 to Station 55+144 at the lower end of West Horseshoe Range, where the material is firm mud, sand and gravel or cobbles. (The section between Station 54 to 55+144 was not included in the area covered by the contract sued upon in this case.) *Bidders are expected to examine*

the work, however, and decide for themselves as to its character and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.

A number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office. (See paragraph 17.) *No guaranty is given as to the correctness of these borings in representing the character of the bottom over the entire vicinity in which they were taken, although the general information given thereby is believed to be trustworthy.*

The price bid per cubic yard for dredging shall cover the cost of removal and disposition of all material encountered, except ledge rock or outcroppings of sufficient size to be classified.

Material to be classified as ledge rock must be of such composition as, in the opinion of the contracting officer, shall require blasting for its removal and shall not include detached rocks or boulders capable of being raised in one piece. Should ledge rock be encountered, all overlying loose material shall be removed at the price bid for the general dredging.

That—

(10) Claimant understood from these specifications that the United States (hereinafter referred to as the 'Government') *did not intend to warrant* the material to be dredged to be 'mainly mud, or mud with an admixture of fine sand,' but claimant did understand that the Government *believed* that such was the character of the material; that it had informa-

tion in its possession sufficient, in its *opinion*, to justify such a *belief;* and that included in that information was the information furnished by the specimens of the material which had been obtained through test borings made by the Government in the usual way for the purpose of ascertaining in the most direct and certain manner the character of said material; and, knowing that the Government had been having dredging done in the channel of the Delaware River at this point for a long time prior to the date of said advertisement, and that it had had ample opportunities for and means of making itself acquainted with the real character of the channel, and that therefore, *if the Government believed* the material to be removed from the area in question to be mainly mud, or mud with an admixture of fine sand, *there was very little likelihood that the material was other than what the Government believed it to be, and little risk involved in assuming that the Government's belief was well founded*, made its bid for said work in reliance upon said representations of the Government with regard to the character of the material to be removed. (R. p. 3, paragraph 10.)

That it was provided in paragraph 28 of the specifications that the contractor should state in his proposal the character and capacity of the plant proposed to be used by him and that this was to be subject to the approval of the contracting officer. The claimant's bid was accepted and its plant was approved.

That (R. p. 4, paragraphs 17 and 18):

> (17) This plant was suitable for the dredging and placing on shore of ordinary mud, or mud with an admixture of fine sand, material which could be removed with comparatively little difficulty or expense.
>
> (18) It was not at all adapted to or suitable for dredging or putting on shore *compacted sand* or *gravel* or other hard and refractory substances.

That the work not proceeding as rapidly as was thought proper, claimant entered into a certain contract with another dredging contractor, which entered on the performance of work under the contract, the additional plant or equipment provided by said subcontractor for use on said work is specified. That (R. p. 4.)

> (22) With plant and equipment claimant could easily have completed all the dredging contemplated by said contract within seven months if the material to be removed had been "mainly mud, or mud with an admixture of fine sand," but said plant was not adapted to the dredging of such hard material as compacted sand and gravel, or other refractory material, except at very heavy cost to the contractor.

That (R. pp. 5–7):

> (24) *From the very beginning of the work the material encountered* by claimant was not mainly mud, or mud with an admixture of fine sand, but mainly material considerably

more difficult to remove, such as firm mud, hard sand, some cobbles, etc.

Nevertheless, the material encountered during the first month or two of the work was easy to dredge as compared with that which was encountered a very short time thereafter, *when claimant encountered, and has continued to encounter until the cessation of the work*, material vastly more difficult and expensive to dredge than mud, or mud with an admixture of fine sand, the same consisting mainly of a very hard, firm mud, together with compacted sand, gravel, cobbles, and clay, a very small percentage being soft mud, and claimant in fact says the material encountered throughout the area covered by said contract has not been mainly mud, or mud with an admixture of fine sand, but that more than seventy-five per cent of it has been of the kind above indicated, hard or compacted sand, gravel, very firm, and mud and cobbles.

(25) Owing to the fact that by far the greater part of the material to be excavated proved to be not soft mud, but vastly more difficult and refractory material, *it became extremely difficult, if not impossible (certainly not possible without providing a different plant,) for claimant to comply with that provision of the specifications which required all material dredged to be deposited in inclosed basins above high water, and in recognition of this fact* the contracting officer, Lieut. Col. George A. Zinn, on the 4th of May, 1915, entered into a supplemental agreement with claimant

copy of which is hereto attached, marked "Exhibit C," wherein it was recited that—

"It is found advantageous and in the best interest of the United States to modify the said contract as hereinafter specified, for the following reasons:

"'*That in the prosecution of the work under said contract, heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles, has been encountered;* that the deposit of said heavy material in inclosed basins above high water is attended with extreme difficulty, calculated to delay the completion of the work; and that the deposit of said heavy material otherwise than in inclosed basins above high water will not be injurious to navigation.'"

And thereupon it is stipulated in said supplemental agreement that the provisions of said original contract with claimant be modified "in the following particulars, *but in no others:*"

"(1) *That all material excavated and removed under the said contract, other than mud, or mud with an admixture of fine sand,* may be deposited in Delaware River at points above or below the Chester Island Dike or behind Tinicum Island, in the order named, and at locations indicated by the contracting officer.

"(2) *That in consideration of the change* in manner of disposal of said material, the unit price of twelve and ninety-nine one-hundredths cents ($0.1299) per cubic yard, scow measurement, as originally agreed upon, *shall be reduced* in the sum of two cents ($0.02), etc.

"(3) That nothing in this agreement shall be understood as affecting any of the provisions of paragraph six of said contract of December 18, 1912."

At the time of entering into this supplemental agreement, claimant, *while having discovered*, as already stated, *that the material to be excavated was entirely different from that which had been indicated in the specifications*, was not aware and had not discovered, and did not discover until shortly before the cessation of work on this contract, that at the time the Government invited bids for this work upon said specifications containing the statement that it believed the material to be removed was to be mainly mud, or mud with an admixture of fine sand, and that test borings had been made over the area to be excavated, the Government had not had any information as to the character of the said material which it deemed sufficient to entitle it to form and express such an opinion, *and particularly did not know that the Government's opinion was not based, as was indicated in the specifications, in any degree upon test borings made in the area to be dredged, and that in fact no test borings had been made.*

(26) As soon as claimant discovered the truth in this regard, he promptly made complaint to the contracting officer, and subsequently to the Secretary of War, and asked for redress.

(27) Claimant further, in fact, says that the maps and drawings in the contracting officer's office in Philadelphia, to which it was referred

in the specifications, purported to show the *result* of test borings made in the area covered by the contract, but claimant has ascertained, and now respectfully shows, that as a matter of fact *no borings whatever had ever been made by the Government in said area* at the time of the advertising for bids and the showing of said specifications to bidders, including claimant.

(28) Claimant further shows that as the result of work actually done, it is able to state, and does state, that if borings had been made, or even careful soundings, at the points in the channel at which said maps purport to show that borings were made, the Government must have known that the character of the bottom was not such as was shown by said supposed borings upon said maps, but that it was mainly compacted sand and gravel and other material of difficult and refractory character.

(29) Claimant is further informed, believes, and charges that the Government through its agents did make certain soundings in said channel, and that the persons making said soundings well knew that the material to be removed, as is disclosed by said soundings, was not "mainly mud, or mud with an admixture of fine sand," but that it was mainly of very much harder, refractory, and more difficult material.

(30) And claimant further, in fact, says that the said statement on the part of the Government in said specifications, that it believed the material to be removed to be "mainly mud, or mud with an admixture of

fine sand," was not true, in that it had no evidence before it which it considered adequate to furnish the basis of a belief as distinguished from a mere guess, and in that said belief was *not based in any degree upon test borings, no such borings having been made.*

(31) *And claimant further says that by reason of said misrepresentations contained in said specifications and upon said drawings it was misled into making a bid for the doing of said work which was very much lower than it would ever have made but for said misrepresentations* and making a contract for a price totally inadequate for the same.

(32) Claimant was also misled into providing itself with a plant and equipment for doing said dredging not suitable for dredging material of the character encountered, so that the time consumed by it in the doing of said work was necessarily much greater than it should have been, and the expense of doing said work vastly increased, so that claimant was compelled to expend a very large sum over and above the rates named in its bid and in said contract, which rates were based, as already stated, upon the material designated in the specifications and upon said maps.

(33) If the material to be dredged had been of the character indicated by the specifications, claimant could have completed the dredging on the estimated 1,340,000 cubic yards at an expense of $107,200. By reason of the fact that the material actually encountered was not the kind indicated in the

specifications, but of a kind vastly more difficult and expensive, as above set forth, the actual expense of dredging the same up to the time of the completion and cessation of the work under contract was__ $688,080.82

Or an excess of_____ 580,880.82

After crediting the amount actually received from the Government under the contract, viz____ 142,959.10

there is a balance left of_____ 437,921.72

for which claimant demands judgment in any event.

(34) But claimant further submits that by *means of the misrepresentations* contained in the specifications and maps regarding the character of the material to be dredged, it was caused to undertake and to do a kind of work which it would never have willingly undertaken, *and did not, in a legal sense, contract to do at all,* and is entitled to be paid the fair value of such work, which would be _____ $688,080.82

less cash received from the Government on account of the work_ 142,959.10

leaving a balance of_____ 545,121.72

for which amount claimant demands judgment.

THE SPECIFICATIONS.

In addition to provisions of the specifications set forth in the petition the following should be noted (R., p. 11, paragraph 7):

> 7. It is understood and agreed that the *quantities* given in these specifications are *approximate only,* and that no claim shall be

made against the United States on account of any excess or deficiency, absolute or relative, in the same. *No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.*

The stated amounts include dredging to a depth of 35 feet below the plane of mean low water, and additional cuts to equal side slopes of 1 on 5.

17. *Maps, data, etc.*—The precise locations of the above-mentioned areas are shown on maps marked "Delaware River, survey for 35-foot channel," which maps, showing the latest *soundings* taken over the areas, may be seen at this office, and should be examined by intending bidders before submitting proposals.

The mean rise and fall of tide in these areas is from 6 to 6.4 feet, and the velocity of the normal tidal current is at the rate of from 1½ to 3 miles per hour.

The usual working season is from March 1 to December 31.

18. *Work to be done.*—The depth of cutting under these specifications will vary from nothing to as much as 20 feet on West Horseshoe Range, 24 feet on Mifflin Range, 9 feet on connecting range, 21 feet on Tinicum Range, and 14 feet on Bellevue Range, figured to the grade depth of 35 feet. *The dredging will extend across the entire 800-foot width of the projected channel,* except over four isolated areas within the limits of the channel on Mifflin Range, and on connecting and the upper end of Tinicum Ranges, where the shoal runs

off into deep water. The lengths of channel to be dredged are as stated in paragraph 16. (R., p. 13.)

19. *Disposal of excavated material.*—The material excavated must be transported and deposited above high water, or in inclosed basins at places provided by the contractor and approved by the contracting officer.

In connection with the deposit of material above high water or in inclosed basins, the contractor must, without cost to the United States, construct and place weirs and sluices and operate them, and construct and maintain mud fences where directed, to the complete satisfaction of the contracting officer, so that there will be no appreciable loss of material. He must also construct and maintain in good condition all necessary banks and bulkheads without expense to the United States. He shall not deposit material upon private property without first obtaining written permission from the owners thereof. All dredging and preliminary work necessary to form dumping basins must be done without cost to the United States, and in a manner satisfactory to the contracting officer. Dredging basins must be dredged and maintained to such a depth and over such an area that the material dumped therein will not overflow their limits at any time.

Any material that is deposited elsewhere than in places designated and approved by the contracting officer will not be paid for, and the contractor may be required to redredge such material and deposit it where directed. The

dumping ground must be plainly marked by conspicuous buoys, ranges, or stakes, and no dumping shall be done unless an inspector is present at the time, and the ranges, buoys, or stakes are clearly visible. (R., p. 14, specification 19.)

21. *Removal of logs, snags, etc.*—The work to be done will include the removal of all obstructions to navigation, including wreckage, lumber, logs, snags, stumps, piles, *boulders, or other material (except ledge rock) found within the limits of the work as it progresses,* all of which shall be deposited on shore above high water or disposed of in some other manner not detrimental to navigation, as may be approved by the contracting officer. (See also last subparagraph of paragraph 27.) (R., p. 15, specification 21.)

22. *Rate of progress.*—Work must be commenced and prosecuted as provided in paragraph 14. If at any time after the date fixed for beginning work it shall be found that operations are not being carried on at a rate sufficient, in the opinion of the contracting officer, to secure completion in the contract time, the contracting officer shall have the power, after 10 days' notice, in writing, to the contractor, to employ such additional plant or labor or to purchase such material as may be necessary to put the work in a proper state of advancement; and any excess of cost thereof over what the work would have cost at the contract rate shall be a charge against any sums due or to become due to the contractor. This pro-

vision, however, shall not be construed to affect the right of the United States to annul the contract as provided for in the form of contract to be entered into. The right is reserved to assume the capacity of the plant and force actually on the work as a measure of probable future progress. (R., p. 15, specification 22.)

37. *Claims and protests.—If the contractor considers any work required of him to be outside the requirements of the contract* or considers any record or ruling of the inspectors or contracting officer as unfair, he shall ask for written instructions or decision immediately and then file a written protest with the contracting officer against the same within five days thereafter or be considered as having accepted the record or ruling. (R., pp. 19, 20, specification 37.)

THE CONTRACT.

The contract appears on pages 20 to 23 of the record.

Attention is called to the following provisions thereof (R. 21–23, paragraphs 2, 3, 7, and 8):

2. In conformity with the advertisement and specifications hereunto attached, and maps marked "Delaware River, survey for 35-foot channel," which forms a part of this contract, the said contractor shall furnish all the necessary plant and labor and *do the work of dredging in the Delaware River,* at lower end of Mifflin range, connecting range, upper end of Tinicum range, and widening the bends at

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ends of connecting range to a depth of 35 feet below the plane of mean low water, a *width of 800 feet in the straight parts, and a width of 1,000 feet in the bends.*

All material excavated and removed shall be deposited above high water or in inclosed basins, at places provided by the contractor and approved by the contracting officer.

It is understood and agreed that the said contractor shall at all times maintain upon the work a sufficient plant to insure the completion of the dredging within the contract time.

In consideration of the faithful performance and satisfactory completion of the above described work, the contracting officer will pay to the contractor the sum of 12 $\frac{99}{100}$ cents per cubic yard, scow measurement, *in full payments for all material excavated, removed, and disposed of in accordance with this agreement.*

3. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. *The decision of the contracting officer as to quality and quantity shall be final.*

7. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications *as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change*

or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor, thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided*, That no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

8. *No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished*, or alleged to have been performed, or furnished under or by virtue of this contract, *and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer*, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

In submitting its proposal for this contract which was accepted, the claimant stated (R. 28):

> We make this proposal with a full knowledge of the kind, quantity, and quality of the work required, and if it is accepted will, after receiving written notice of such acceptance, enter into contract within the time designated in the specification, with good and sufficient sureties for the faithful performance thereof.

THE SUPPLEMENTAL CONTRACT.

The supplemental contract appears on pages 24 and 25 of the record, the reason for its making is expressly stated in it, and is (R. 24):

> That in the prosecution of the work under said contract heavy and refractory material, consisting mainly of compacted sand and gravel, with a small percentage of cobbles, has been encountered; *that the deposit of said heavy material in inclosed basins above high water is attended with extreme difficulty, calculated to delay the completion of the work;* and that the deposit of said heavy material otherwise than in inclosed basins above high water will not be injurious to navigation.

It is apparent from this that the reason for the supplemental contract was not the difficulty in dredging the heavy material, but the time and expense incident to depositing the same as provided in the original contract, and that for the purpose of being relieved from this condition regarded by it as onerous, the claimant agreed to accept a reduction of two cents per cubic yard from its compensation as originally fixed.

It will be noted from the foregoing that the petition attempts to establish a cause of action for damages on account of misrepresentation inducing it to enter into a contract, and that the prayer is in the alternative, for the usual damages in an action for deceit, namely, its loss, or for what the work was reasonably worth.

FINDINGS.

Particular attention is invited to the findings in this case for the reason that they neither substantiate the essential allegations of the petition, nor is the opinion of the court responsive thereto, and, in addition, there is absolutely no finding as to the value or reasonable value of the work done by plaintiff.

The material findings will be here set out.

FINDING II.

In the year 1909, at a time when the project for deepening the channel of the Delaware River to 35 feet was before Congress, *the "test borings"* referred to in paragraph 27 of the specifications above mentioned *were made by defendants' agents.* They were made along the approximate center line of the proposed channel at 1,000-foot intervals, for the purpose of obtaining information on which to base an estimate of cost, and were made throughout a length of about 48 miles of the proposed channel. *These "test borings"* were made by forcing by hand pressure a long pole or spar with a hollow 1-inch iron pipe at the end into the river bed to grade, and the character of the material encountered was determined by the "feel" of the rod, and its location below mean low water was determined by measurements marked on the rod itself. These "test borings" were numbered consecutively, and in the area embraced by plaintiff's contract were numbered from 111 to 120, inclusive. A record was kept of the result at each of said borings or probings, and the material indi-

cated as being encountered by said method *was correctly entered upon field notes.* At several places in the entire area, and at two instances numbered 113 and 114 in the area included in plaintiff's contract, the probe struck hard, impenetrable material and would not go down under the method used. The fact was correctly recorded on the log or field notes at the time. A tracing or tracings were then made, upon which were correctly transcribed the data shown on the log or field notes, including the said information as to numbers 113 and 114 and other places where the probe had not penetrated. These tracings were forwarded to defendants' engineering office at Philadelphia.

Subsequently, and in about two months after said probings were made, the said agents who made them repaired to the places where the probe had not penetrated and made borings at those places by a method known as "wash borings," which consisted in inserting a cylinder in the soil below and applying a jet of water through a pipe, *which had the effect of bringing up the material below, and a correct record was made of the result of these "wash borings."* This record was also sent to the said engineering office. Thereafter, when the map exhibited with the specifications submitted to the bidder was made, *it showed the result of the said probings as reported by the parties who made them and shown upon said tracings, except at borings 113 and 114, where the map showed the result of the wash borings as reported.*

The map did not show the result of the probings at borings 113 and 114. The use of the probe and the use of the wash boring are each an approved method of ascertaining the character of soil or material in dredging operations. There is a third method, known as "core borings," which would accurately determine the precise material to be encountered, *but that method is not used to ascertain the character of material to be dredged.* It is frequently used where superstructures are to be placed. The *probing method* for ascertaining material to be dredged *is an approved method* and *is the method universally adopted by the Government and contractors on the Delaware River.*

The plaintiff, before executing the contract aforesaid, visited the office and examined the maps referred to in the specifications. Said maps contained a record of 26 borings, covering specified sections that were to be dredged, and of these 10 were in the section of the Delaware River which, by its contract afterwards made, the plaintiff agreed to dredge. Ten of said borings, according to the map of the defendants, indicated material as hereinafter shown. *The map did not indicate the method used in making the borings.* The map did not give the time when these borings were made, nor was it stated whether the borings were wash borings or core borings, or whether the boring was done by a probe. There was nothing on the map exhibited to bidders showing the field notes taken at the time the borings were

made. The numbers of borings covering that section of the Delaware River embraced in the contract of the plaintiff were 111 to 120, inclusive.

On said map opposite Nos. 111 to 120, inclusive, under the heading "Material," were legends as follows: "No. 111, Frm. sdy. md.," meaning firm sandy mud. "No. 112, Frm. sdy. md. to 40.2, then hrd. gvl.," meaning firm sandy mud to 40.2 feet, then hard gravel. "No. 113, loose gvl. to 38.1, then fine compact gvl. to 39.3, then coarse loose gvl." "No. 114, loose gvl. to 35.5, then compact gvl." "No. 115, sft. md. to 40.7, then sdy. md.," meaning soft mud to 40.7 feet, then sandy mud. "No. 116, sft. md. to 39.8, then hrd. gvl.," meaning soft mud to 39.8, then hard gravel. "No. 117, sft. md. to 41.0, then frm. sdy. md.," meaning soft mud to 41 feet, then firm sandy mud. "No. 118, sft. md. to 41.2, then frm. sdy. md.," meaning soft mud to 41.2 feet, then firm sandy mud. "No. 119, sft. md. to 41.9, then frm. sdy. md.," meaning soft mud to 41.9 feet then firm sandy mud. "No. 120, sft. md. to 40.6, then hrd. sd.," meaning soft mud to 40.6 feet, then hard sand. *The plaintiff did not examine the site of the work for itself before making its bid,* and had no information *and made no inquiries as to the character of the material to be dredged* except that given by the defendants on the map above described.

There was time between the dates of the advertisement and the proposals for a proposed bidder to make an examination of the area and to make

probings in the manner in which the defendants had made them.

On November 8, 1912, plaintiff submitted a proposal to do said work at 12.99 cents per cubic yard by scow measurement, and its proposal, among other things, contained the following statement:

"*We make this proposal with a full knowledge of the kind, quantity, and quality of the work required,* and if it is accepted will, after receiving written notice of such acceptance, enter into contract within the time designated in the specification, with good and sufficient sureties for the faithful performance thereof."

From this finding very important facts appear, namely:

1. The Government had actually made the test borings which the specifications stated it had made. The use of the probe and wash borings was the approved method of ascertaining the character of soil or material in dredging operations, and was the method universally adopted by the Government and contractors on the Delaware River. The method known as "core borings" was never used to ascertain the character of material to be dredged. The result of the borings was correctly transcribed and shown on the map which was exhibited to claimant. The fact that wash borings were taken at Nos. 113 and 114 while probe borings were taken at the other places was really to the benefit of prospective bidders. It appears that the wash borings were taken as an additional means to acquire information, and that

the result of the same was correctly shown. That the number of borings was ten in a space to be dredged which measured approximately 800 feet in width by 2 miles in length.

2. It is positively found that there was time between the date of the advertisement and of the proposals for a prospective bidder to make an examination of the area to be dredged and to make probings, and that claimant did not embrace the opportunity to examine the site or make probings. It is also found that claimant made a positive representation that it had full knowledge of the kind, quantity, and quality of the work required.

FINDING III.

The legends on said map do not contain a true description of the character of the material which was encountered by plaintiff in the prosecution of work. The material to be dredged at the other borings was different from that shown on the map exhibited to bidders.

The statements in the specifications and drawings concerning the character of the material to be dredged were based upon the said data obtained from the tracings made by the Government's agents as aforesaid, and said probings and borings were made in good faith by the agents of the United States and were believed by them to correctly represent the character of the material through which the probe penetrated, and at the points where the probe had not penetrated to correctly show the character of the material where the wash boring method was used.

This finding is important because the first part of it is the only finding which is at all responsive to the theory that the Government misrepresented anything. It finds that the legends on the map did not give a *true description of the character of the material which was encountered by claimant.* There is absolutely no finding that the Government, or anybody for it, represented that said legends gave a true description of the material which claimant would encounter, but it is found, as hereinbefore referred to in Finding II, that the legends on the map did give the correct result of the test borings; that they were true. This finding seems to have been on the supposition that there was some other express finding that the Government had positively represented that the legends on the map gave a true description not of the result of the test borings but of the *materials that claimant would encounter.* There is no such finding. On the contrary, Finding III, under consideration, expressly states that the test borings were made in good faith and were believed to represent correctly the character of the material through which the probe penetrated, and at the points where the probe had not penetrated to correctly show the character of the material where the wash borings were used, and it is found in Finding II that the results of these test borings were correctly shown.

FINDING IV.

> The plant which was brought on the work by the plaintiff was inspected and approved by the defendants, and was efficient for dredging the character of material which was mentioned in the specifications and described on the map, to which bidders were referred by defendants for information. But it was not efficient for dredging the material as it was actually found to exist. The plaintiff secured the services of another concern to do the dredging for it, and that concern did all the work that was done.

It appears from Finding II (R. 28) that claimant stated in its proposal that it had full knowledge of the kind, quantity, and quality of the work required, and thereupon produced its plant for doing the work, which was approved by the Government. The finding is that the plant was efficient for dredging "the character of material which was mentioned in the specifications and described on the map," but it does not find that the Government had represented that those were the materials to be dredged. On the contrary, it is found that the representation was only as to the result of the borings being correctly shown on the map, and the opinion was advanced that the information given thereby was fairly trustworthy. It may be claimed that by inference, when the Government approved claimant's plant, which claimant itself selected and produced, that the Government guaranteed that the plant would do the work; but

there is no such finding and nothing to warrant such an inference. It further appears from this finding that claimant actually did no work at all and that all of the work was done by another contractor.

This finding as to the plant brought to the work by claimant has no significance whatever. There is no finding that the Government either directly or by inference required any specific sort of plant, made any representation in regard thereto, or that the said plant was ever used.

FINDING V.

> After plaintiff, or the concern it had employed, had been at work for some time upon the said dredging, the plaintiff complained of the character of the material which was being encountered, and after some correspondence a supplemental contract was entered into on May 4, 1915, between the parties relative to the prosecution of the work, and a copy of the supplemental contract is filed with the petition herein, marked Exhibit "C," and is made a part of these findings by reference.

This finding must be taken in consideration with the supplemental contract and the petition. It appears (petition, R. 5) that claimant from the very beginning of the work had encountered "heavy and refractory material, consisting mainly of compacted sand and gravel with a small percentage of cobbles," and that after it had been at work for more than two years and was entirely familiar with the material it was dredging, it obtained from the Government a modification of its contract for this reason. It does

not appear that any complaint whatever was made by it as to the character of the material to be *dredged*, or that resort was had on this account to the method provided by the contract for any requirements outside of the terms of the contract (par. 37, R. 19, 20).

FINDING VI.

From Finding VI it appears that "On or about the month of December, 1915," although claimant was in possession of all facts in connection with the material to be dredged, and all facts incident to this contract, it then learned of the *manner* in which the probings had been made. There was no dispute that the probings had been made and that the result of the same was correctly communicated to claimant, and in addition for almost three years claimant had been working on the material which it claimed to have been misrepresented. On learning *how* the probings had been made, it thereupon discontinued work and rescinded the contract. In connection with this it is significant that no representation whatever had been made to the claimant as to how or in what manner the probings had been made, and it is expressly found by the court that they were made after the approved manner of making probings for information as to dredging in the Delaware River by "the method universally adopted" for that purpose. It is also found that at the time when the plaintiff disaffirmed its contract, it did not know that at points 113 and 114 the probe had reached an impenetrable material. It does not appear when it gained this information, but from the opinion of the court we take

it that it was not known until after this suit was filed. It is not disputed, however, and is expressly found by the court that the *result* of the probings made at these points was correctly shown on the map and exhibited to plaintiff. In fact, the court finds (Finding II, R. 28) that the legend was as follows: "No. 113, loose gvl. to 38.1, then fine compact gvl. to 39.3, then coarse loose gvl." "No 114, loose gvl. to 35.5, then compact gvl." That is the claimant complains because it was not told that the probe had struck impenetrable material, though it was shown the exact material which was struck and none of it was shown on the map to be "mainly mud, or mud with an admixture of fine sand." As is plainly found (Finding VI, R. 30), the material actually removed from the vicinity of points 113 and 114 was not as difficult to dredge or hard to remove as that shown by the map. It is found by the court that in the vicinity of boring 113 the material dredged shows a mixture of 24 per cent mud, 60 per cent sand, and 16 per cent gravel. In the vicinity of boring 114 the material showed a mixture of 50 per cent sand, 45 per cent gravel, and 5 per cent clay. The finding of facts is silent as to in what way either the specifications or the map could possibly have misled claimant as to these points, and its entire case seems to rest upon them. Finding VI further shows that at the time plaintiff stopped work there remained approximately 350,000 cubic yards of material to be dredged under its contract; that this work was completed under contract by another dredging company at the price of 16.2 cents per cubic yard. While the finding does not show that

claimant did no dredging in the vicinity of the two borings upon which it rests its case, i. e., Nos. 113 and 114, this finding does show that the dredging done by the contractor who assumed the work after appellee's default was in the vicinity of these stations.

FINDING VII.

Finding VII is that the claimant expended in the prosecution of the work $354,009.19; that it received from the United States the sum of $142,959.10, making claimant's *loss* on said contract the sum of $211,050.09. There are no specifications as to this finding; that is, of the different amounts that went to make the total expenditure of $354,009.19, and not even a finding as to the increased cost of encountering material which was not anticipated. In its petition claimant set forth that its total expenditures were $688,080.82 and its loss $437,921.72. While it does not appear from the findings, a calculation made from the total amounts set forth shows that the entire work under the contract would have cost the Government the sum of $189,000; that claimant was paid the sum of $143,000 and the Government paid an additional $56,000 to finish the work which claimant left uncompleted. The additional award of this judgment, to wit, the sum of $211,050.90, would make a total cost to the Government of over $400,000 instead of $189,000 as originally contemplated. That claimant in its petition asked judgment at the rate of 40 cents per cubic yard for work for which it agreed to take 12.99 cents per cubic yard, and that the judgment fixed the price at approxi-

mately 27 cents per cubic yard, though the Government was able to have the most difficult part of the work left uncompleted by claimant performed by another contractor at 16.2 cents per cubic yard, presumably at a profit to the contractor.

There is no finding whatever of the reasonable value of the work performed by claimant, and there is no data in the finding of facts upon which any inference as to this could be made, except that the Government, having been able to secure another contractor to complete the most difficult part of this work at a price of 16.2 cents per cubic yard, would indicate that in any event the reasonable price would have been less than that amount.

THE JUDGMENT OF THE COURT OF CLAIMS.

The case was decided by a divided court, the Chief Justice rendering an exhaustive dissenting opinion (R. 36–49) in which Judge Downey concurred. Many of the statements found in the opinion of the majority of the court have no basis in the findings of fact. The court seems to have adopted the theory that some representations, aside from the specifications and map, were made to claimant by some officers or agents of the United States. But, if any such representations were made, it is not shown what they were and there is no finding as to the same. The court apparently adopted the theory that misrepresentations of some kind were made and that, therefore, the claimant was justified in abandoning its contract, which had been partly performed, and suing for damages, and that the measure of damages would be its loss.

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ASSIGNMENT OF ERRORS.

It is submitted that the Court of Claims erred in the following particulars:

1. In holding, from the facts found, that there was any breach of duty on the part of the United States.

2. In misapplying the law to the facts as found.

3. In holding that under the facts as found it had jurisdiction to award judgment for claimant.

4. In misapplying the law as to the measure of damages.

BRIEF OF ARGUMENT.

I. There was no misrepresentation.

II. Even had there been misrepresentation, claimant, by electing to proceed with the contract, ratified it and is estopped.

III. By the finding of facts and the act defining its jurisdiction the Court of Claims, if it had jurisdiction at all, is precluded from applying the measure of damages it applied in this case.

I.

THERE WAS NO MISREPRESENTATION.

(a) THERE WAS NO MISREPRESENTATION IN FACT.

We have endeavored in the statement of the case to show that there was, as a matter of fact, no misrepresentation by the United States. The facts as found show that the probings were made in good faith, that the legends on the map exhibited to claimant show the exact result of these probings. It is complained that "the legends on the map do not contain a true description of the material which was en-

countered by plaintiff." (R. 3, Finding III.) It was never asserted by the United States that they did. It was shown on the map that there were ten borings in an area two miles or more in length by 800 to 1,000 feet in width, the area which claimant contracted to dredge; it was stated that the map showed the *results* of these borings, andit is conceded that it did. This is far, very far, from a statement that the legends on the map showed a "true description of the materials to be dredged;" but the specifications expressly stated (R. 39):

> A number of test borings have been made in all of the areas where dredging is to be done under these specifications, and the results thereof may be seen by intending bidders on the maps on file in this office. *No guaranty is given as to the correctness of these borings in representing the character of bottom over the entire vicinity in which they were taken*, although the general information given thereby is believed to be trustworthy.

To state the truth can hardly be called a misrepresentation; this representation is true in every detail, and is so found by the Court of Claims, namely—

(1) A number of test borings had been made.

(2) The result of the borings could be seen on the map by prospective bidders.

(3) The result of the borings was correctly shown on the map.

(4) The general information given by the result of the borings was believed to be trustworthy.

There is absolutely nothing false about it. Nothing is said as to the time when the borings were made. No inquiry was made by claimant as to this and there is nothing to show that subsequent borings would have given any other or better information. In addition, we submit that the legends on the map (R. 2–3) were substantially indicative of the material actually encountered in the dredging as shown by Finding IV (R. 5).

It was further stated in the specifications generally (R. 2):

> The material to be removed is *believed* to be mainly mud, or mud with an admixture of fine sand. * * * *Bidders are expected to examine the work, however, and decide for themselves as to its character, and to make their bids accordingly, as the United States does not guarantee the accuracy of this description.*

This statement is also found to be true, and to have been made in good faith (R. 3, Finding III). In terms it is a statement of mere belief, and to avoid any possible misconstruction, the warning is given that it is in no sense a guarantee and that bidders must inspect and decide for themselves. This general statement is followed by the statement as to the maps and borings (last above referred to); and the warning is again given that there is no guarantee that the result of the borings correctly indicates the material to be dredged. There is *no* general or specific *guarantee* in the specifications or contract as to the materials to be dredged; there is *no*

general or specific positive *statement* as to these materials; all that is advanced is a *belief*, honestly formed and in good faith held (as found by the Court of Claims), and the facts on which this belief was founded, i. e., the results of the borings, were fully and correctly disclosed to claimant so that it could judge for itself. Claimant also was of the opinion that the results of the borings was trustworthy information; for they had been obtained by *"an approved method * * the method universally adopted by the Government and contractors on the Delaware River"* (Finding II, R. 28). Claimant was a dredging contractor (Petition, R. 1) and therefore, without examining the site, and without making inquiries (R. 3, Finding II), though it had ample time to make an examination for itself (perhaps because it had an impression of its own as to the material in the channel of the Delaware River) (Petition, R. 2), it decided to assume whatever "risk" there might be (Petition, R. 3) and submitted a proposal in which it solemnly asserted (R. 3)—

> We make this proposal with a full knowledge of the kind, quantity, and quality of the work required * * *.

Here is a direct, positive representation by claimant which should estop it from now asserting that it was not true. If it is misrepresentation to express an opinion, honestly formed from facts upon which any reasonable person might form such opinion, and when, in expressing it one states that it is only an opinion, that he does not guarantee its correctness,

and advises against reliance upon it without independent investigation and judgment, if it turns out that the opinion, while reasonably correct is not accurately so in every detail, then there might be a claim that some misrepresentation was made in this case. The impression remains, however, that misrepresentation in fact means an untruthful statement or act, and the record in this case will be searched in vain for an untruthful statement made directly or by implication on behalf of the United States.

Much is sought to be made of the fact that it was not disclosed to claimant when he examined the map that the results of the tests had been obtained by "probings." The manner of making different tests is fully set forth in Finding II (R. 27, 28), and it is shown by this finding that the method followed was the one "universally adopted by the Government and *contractors* on the Delaware River." The tests at another place in the specifications are spoken of as "soundings" (R. 13, par. 17). There is nothing to show that any inquiry was made by claimant, that there was any concealment practiced, any failure to disclose, and finally, absolutely no finding that it was in any way material or essential to claimant to be told that the results had been obtained by the method "universally adopted by the Government and contractors."

As to the claim that the Government did a reprehensible thing in not informing claimant that the probe had struck impenetrable material at stations

13 and 14, claimant did not learn of this until after this suit was filed (R. 33), and it therefore had no bearing whatever on the matter; but, as it is shown by the findings (R. 27, 28) that the map, instead of reciting that certain material had been encountered by the probe at these stations, *showed the actual material encountered.* It is rather difficult to understand the deception. Suppose the probe had struck rock, wouldn't the best information be that it had struck rock, instead of stating "impenetrable material?" What it struck at 113 and 114 was gravel, and this was shown on the map.

(*b*) **THERE WAS NO MISREPRESENTATION IN LAW.**

The claimant's case is founded upon the proposition that it was induced to enter into this contract by misrepresentations of such character that upon their discovery by it it was justified in rescinding the contract and suing for damages. There is no claim that by the action of the Government it was prevented from completing its contract. What is required to make out a case of this character is set out by Mr. Justice Lamar in *Southern Development Company* v. *Silva* (125 U. S. 247) at page 250, where is is stated:

> In order to establish a charge of this character the complainant must show by clear and decisive proof—
>
> *First.* That the defendant has made a representation in regard to a material *fact;*
>
> *Secondly.* That such representation is false;

Thirdly. That such representation was not actually believed by the defendant, on reasonable grounds, to be true;

Fourthly. That it was made with intent that it should be acted on;

Fifthly. That it was acted on by complainant to his damage; and

Sixthly. That in so acting on it the complainant was ignorant of its falsity, and reasonably believed it to be true.

The first of the foregoing requisites excludes such statements as consist merely in an *expression of opinion or judgment, honestly entertained;* and, again (excepting in peculiar cases), it excludes statements by the owner and vendor of property in respect to its value.

The facts as found by the Court of Claims fail completely to establish (even by inference) any misrepresentation of this character by the Government and as before argued, fail to show any misrepresentation at all.

Claimant's case must, therefore, rest upon the theory that disregarding the form of its action, it can be said to rely on the proposition that the Government made a representation which amounted to a warranty or guaranty, as to the material to be removed; that claimant had a right to rely upon this representation, and having relied upon it, is entitled to be compensated for the loss occasioned in carrying out the contract, in so far as it carried it out. Disregarding for the present the rule that

the only recovery that could be had by it, if its theory is correct, would be the reasonable value of the work and would not be damages, it is submitted that the facts as found in no way substantiate its claim.

The misrepresentation which it must establish is that the Government misrepresented to it the *material on the bottom of the Delaware River covering an area of approximately 2 miles in length by from 800 to 1,000 feet in width.* If this misrepresentation was made at all, it could only have been made (1) by positive statement, or (2) by concealment of some material fact known to the Government and which it was its duty to disclose.

(1) It is too apparent for argument that the Government did not make any positive statement as to the character of the material to be dredged; it made no *positive* statements whatever as to the character of this material. The statements attributed to it are far from being as strong as statements which were held to be mere expressions of opinion in the case of *Southern Development Company* v. *Silva* (125 U. S., 247). That case was somewhat analogous to this in that the claim of misrepresentations were in regard to the bottom of an ore chamber in a mine, the bottom being covered with loose ore so that it could not be seen. The specifications which claimant relies upon positively state that the Government expressed only a belief formed from the results of certain test borings, and that it believed that these results

gave trustworthy information. This statement by its terms excludes any construction that there was a positive representation of the materials to be dredged. The only positive statement is that it believed the materials to be as indicated, and it is expressly found by the Court of Claims that this positive part of the statement was true; that the Government actually and in good faith held this belief, and the results of the probings justified it. In addition, claimant was admonished that this was only an expression of opinion on the part of the Government. It was shown the facts upon which this opinion was based and it was urged to make an independent investigation. It is expressly found that it did not make this investigation, though it had ample time to do so. Its petition, in fact, negatives its claim that any positive representation upon which it relied was made as to these materials. Paragraph 10 of the petition (R. 3, ante this brief, p. 3) states that its reliance was not upon a positive statement of the Government as to the materials, but was on the fact that if the Government believed the material to be removed to be mainly mud, etc., there was very little likelihood that there would be anything else and, therefore, that there would be "little risk involved in assuming that the Government's belief was well founded." Thereupon it made its bid without investigation. By its own statement it relied not on any positive representation by the Government, but relied on

a "belief" of the Government, knowing that it was only a "belief," and that there was a risk in placing reliance upon such an intangible thing; but, nevertheless, it assumed the risk. The admission that claimant knew it was assuming a risk when it relied upon a belief without investigation as to the true facts absolutely nullifies any claim of being damaged by a positive representation upon which it relied and had the right to rely. This really is an end of the matter. The fact that the borings were what is known as probe borings, and the fact that the probe at two places struck impenetrable material, if they have any relevancy at all, only go to the representation as to the material to be dredged, about which no representation was made. That any contention as to the manner in which the test borings were made is without merit is shown by Finding II (R., 28); that the probe method is an approved method and the one universally adopted by the contractors and the Government in the Delaware River; that no statement was made as to by what method the test borings had been made, and that the results were correctly carried in the legends on the map. Likewise, the fact that the probe struck impenetrable material at stations 113 and 114 is immaterial, because wash borings were subsequently used at these stations, and the results were correctly shown on the map which was exhibited to claimant. Moreover, this fact was not learned by claimant until after it had filed its suit.

There is no claim whatever that the correct result of the test borings at these stations were not shown to claimant.

(2) Nor was there any concealment of a material fact by the Government with reference to the test borings. The specifications stated that test borings had been made, and the results. In one place in the specifications the test borings are referred to as "soundings." That the use of the probe method is a test boring is shown by the finding of facts. The probe was driven, bored, into the material at the bottom of the river; it was the method exclusively used; the method known as core borings was never used in the Delaware River. It is not apparent why, when the specifications showed that test borings had been made and the probe boring method was the one universally used in this river, and no inquiry was made by claimant as to in what manner the test borings had been made, that there was any duty on the part of the Government to state that the probe method had been used. If some other method had been used, it might possibly be argued that a prospective bidder might have been misled on account of the fact that the probe method was the one universally used, and in the absence of some statement to the contrary he had the right to rely on the fact that it was used in this case. Nor was there any duty on the Government to recite in its specifications that the probe had struck impenetrable material at Stations 113 and 114. The specifications purported to show the materials actually encountered

in making the test borings, nothing more. There was no recital whatever as to how they were made, but the material encountered was truthfully shown in each instance; this information was not obtained in the first instance by the probe method, and therefore the wash method was resorted to and the result shown. Upon this theory the Government should have had the legends on the map simply show that in certain places the probe penetrated to a certain depth and in other places it did not penetrate at all; this would have shown nothing as to the character of the materials to be dredged, and it is difficult to conceive how anyone could possibly be misled by showing the actual result of the test borings, that is the materials encountered, because he was not advised as to how the borings were made. Attention is again called to the fact that the test borings, few as they were, were really quite indicative of the materials to be dredged.

This case is governed by Simpson v. United States (172 U. S. 372) and similiar cases.

Claimant relies on the cases of *United States* v. *Stage Company* (199 U. S. 414), *Hollerbach* v. *United States* (233 U. S. 165), *Christie* v. *United States* (237 U. S. 234), and *United States* v. *Spearin* (248 U. S. 132).

In each of the above cases a *positive* statement was made as to a material fact, which proved to be un true and caused a loss to the contractor which he would not have incurred except for the false statement.

In *United States* v. *Stage Company* it was positively stated that the number of stations to be served was two, when in fact it was four, which fact was known to the Government.

In *Hollerbach* v. *United States* a definite, positive statement, which was untrue, was made (p. 168), namely:

> The dam is now backed for about 50 feet with broken stone, sawdust, and sediment.

The facts were that it was backed with soft, slushy sediment and cribwork. A general paragraph of the specifications stated:

> It is expected that each bidder will visit the site of this work, the office of the lockmaster, and the office of the local engineer and ascertain the nature of the work * * *.

Since the specifications contained this positive statement, Mr. Justice Day observed (p. 172):

> We think it would be going quite too far to interpret the general language of the other paragraphs as requiring independent investigation of the facts which the specifications furnished by the Government as a basis of the contract left in no doubt.

Certainly in the case at bar there is no positive statement guaranteeing the accuracy of the borings, but quite the reverse, and the paragraph calling attention to the borings also called attention to the refusal of the Government to guarantee them.

In the case of *Christie* v. *United States*—

> The material to be excavated, *as far as known*, is shown by borings, drawings of which

> may be seen at this office, but bidders must inform and satisfy themselves as to the nature of the material * * * (p. 239). (Italics by the court.)

The facts were that the materials were not shown by the borings, drawings of which were exhibited, *as far as known*, because in making the borings the engineers, when encountering logs or foreign materials, withdrew their boring apparatus without making any notation thereof and moved the apparatus aside so that it would not encounter these obstructions. Only the borings which did not encounter obstructions were recorded. Consequently the representation that the boring sheets showed material *as far as known*, was false, even though the Government was not chargeable with any sinister motive in not recording the omitted borings. The following quotation, however, from the opinion of the court in the Christie case, we think is peculiarly applicable to the case at bar:

> We do not think, therefore, that there is anything in the contract which cast upon the Government a prophecy and anticipation of abnormal conditions or which relieved claimants from the risks of their occurrence or of whatever they might encounter in the work. It is to be supposed that contemplation and judgment were exercised not only of certainties but of contingencies and allowance made for both at the time of bidding, with provision in the bid. Subsequent conditions could not lessen the obligation then incurred * * * (p. 245).

Furthermore in the Christie case it was found that the contractor did not have time to make an independent investigation, while in the case at bar it is expressly found that it did have time but did not make the investigation.

The Spearin case is so clearly distinct from the one at bar that it is unnecessary to consider it.

So far as analogy of cases goes, the case falls in the class illustrated by *Simpson* v. *United States* (172 U. S. 372). In the Simpson case borings were made and recorded on a profile drawing, which was consulted by the contractor before making his bid. The material shown on the profile and there indicated as stable and containing no quicksand (p. 373) turned out to be quicksand, and much additional expense above that anticipated was incurred by the contractor in building on that material. Yet in that case the court would not imply a warranty, Mr. Justice White saying (p. 381):

> The fact that the bidders knew that a test of the soil in the yard had been made, and drew the contract providing that the dock should be located on a site to be designated by the United States *without any express stipulation that there was a warranty* in their favor that the ground selected should be of a defined character, precludes the conception that the terms of the contract imposed such obligation on the Government in the absence of a full and clear expression to that effect, or at least an unavoidable implication. This is made clearer by other portions of the contract and specifications.

In the opinion of the majority of the Court of Claims in this case the following sentence appears:

> The officer making the contract which we are considering was authorized to make it, and the plaintiff in its dealings with him had a right to rely on any representation made by him which related to the subject matter of the contract (R., p. 34).

There is no finding of fact that any representation was made to claimant by any officer of the Government. Even if any such statement had been made, appellant submits that the court's view of the law is incorrect, unless the so-called representation is *a part* of the written contract between the parties. The opinion of the Court of Claims indicates that the court construes the Christie case as authority for the proposition that the Government is liable for any representation of its officers or agents, whether embodied in the contract or not. In the Simpson case, *supra*, Mr. Justice White says (p. 379):

> Considering the facts above stated, it is at once apparent that the claim against the United States can only be allowed upon the theory that it is sustained by the written contract, since if it be not thereby sanctioned it is devoid of legal foundation.

Unless the law has been changed to the effect that on all Government contracts the Government guarantees that the contractor will not suffer a loss in carrying out his contract, the case falls within that

class where this court has said the law is well settled, namely (*Spearin* v. *United States*, 248 U. S. 136):

> Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforseen difficulties are encountered. *Day* v. *United States*, 245 U. S. 159; *Phoenix Bridge Co.* v. *United States*, 211 U. S. 188 * * *; *Dermott* v. *Jones*, 2 Wall. 1.

II.

EVEN HAD THERE BEEN MISREPRESENTATION, CLAIMANT, BY ELECTING TO PROCEED WITH THE CONTRACT, RATIFIED IT AND IS ESTOPPED.

Claimant, after part performance, rescinded the contract and refused further performance, claiming its right so to do on the ground that the Government had represented the material to be dredged to be "*mainly* mud or mud with an admixture of fine sand," but that in fact "it was *mainly* of very much harder, refractory and more difficult material." (Petition, 29; R. 6–7.) Claimant began work on the contract early in February, 1913, and states (petition, R. 5):

> From the very beginning of the work the material encountered by claimant was not mainly mud, or mud with an admixture of fine sand, but mainly material considerably more difficult to remove, such as firm mud, hard sand, some cobbles, etc. Nevertheless, the material encountered during the first month or two of the work was easy to dredge as compared with that which was encountered a very short time thereafter.

Therefore claimant, having ascertained at the "very beginning of the work" the true character of the materials which it claimed had been misrepresented to it, did not rescind its contract or complain (as it should have done if the materials were not covered by the contract, specification No. 37 R. p. 19), but proceeded with the work for more than two years and then, in May 1915, knowing all there was to know about the material, entered into a supplemental contract in which the character of the material was correctly stated (R. 5) and this contract was entered into not because it had encountered material which it had not contracted to dredge, and not because any misrepresentation had been made to it, but, as recited in the contract, to relieve it from the requirements of the main contract as to deposit of dredged matter. By this supplemental contract it again agreed to do the work, but at a decreased compensation. Thereafter it continued with the dredging until December 5, 1915, when it "discontinued work under the contract and declined to do further work" (R. 30). And in this connection it is interesting to note that approximately half of the material dredged by claimant was dredged *after* the supplemental contract was entered into. It is sought by the petition to justify this course of action by the following allegation (R. 6, par. 3):

> At the time of entering into this supplemental agreement, claimant, while having discovered, as already stated, that the material

> to be excavated was entirely different from that which had been indicated in the specifications, was not aware and had not discovered, and did not discover until shortly before the cessation of work on this contract, that at the time the Government invited bids for this work upon said specifications containing the statement that it believed the material to be removed was to be mainly mud, or mud with an admixture of fine sand, and that test borings had been made over the area to be excavated, the Government had not had any information as to the character of the said material which it deemed sufficient to entitle it to form and express such an opinion, and particularly did not know that the Government's opinion was not based, as was indicated in the specifications, in any degree upon test borings made in the area to be dredged, and that in fact no test borings had been made.

The findings of fact not only negative this allegation, but positively find the contrary, namely, the Government did have information upon which to form a belief or opinion; that this belief was held and expressed in good faith, but simply as a belief, and it was based on "test borings" made by "an approved method * * * the method universally adopted by the Government and contractors on the Delaware River."

It is apparent that claimant knew it was bound by its contract, having relied on its own judgment and not on any positive representation of the Government, for, if the Government had made a positive representation (of the character illustrated by the

Hollerbach and Christie cases), claimant at "the very beginning" could have rescinded its contract. By its conduct it shows that it did not consider that there was any breach of duty on behalf of the Government that relieved it from the burdens it had assumed, and the excuse given, when it finally stopped work, by the findings of fact is shown to be no excuse. Even if the Government had made a misrepresentation as to the borings, that misrepresentation would necessarily have been as to the character of the material to be dredged, and claimant knew all there was to know about this from the "very beginning." If there had been a misrepresentation as to materials which would have excused it, this was known as soon as work was begun and it should have acted then. By continuing it ratified the contract.

> While the party entitled to relief may either avoid the transaction or confirm it, he can not do both; if he adopts a part he adopts all; he must reject it entirely if he desires to obtain relief. Any material act done by him, with knowledge of the facts constituting the fraud, or under such circumstances that knowledge must be imputed, which assumes that the transaction is valid, will be a ratification. (Pomeroy's Equity Jurisprudence, v. 2, sec. 916, 4th ed.)

The same author states in section 917, page 1915 (4th ed.):

> The injured party must assert his remedial rights with diligence and without delay upon becoming aware of the fraud.

In *Shappirio* v. *Goldberg* (192 U. S. 232) it is stated in the opinion (p. 242):

> It is well settled by repeated decisions of this court that where a party desires to rescind upon the ground of misrepresentation or fraud, he must upon the discovery of the fraud announce his purpose and adhere to it. If he continues to treat the property as his own the right of rescission is gone and the party will be held bound by the contract. (*Grymes* v. *Sanders*, 93 U. S. 55; *McLean* v. *Clapp*, 141 U. S. 429.) In other words, when a party discovers that he has been deceived in a transaction of this character he may resort to an action at law to recover damages, or he may have the transaction set aside in which he has been wronged by the rescission of the contract. If he choose the latter remedy, he must act promptly, "announce his purpose and adhere to it," and not by acts of ownership continue to assert right and title over the property as though it belonged to him.

See also:

Wilson v. *Cattle Ranch Co.*, 73 Fed. 994.

Kingman v. *Stoddard*, 29 C. C. A., 413; 85 Fed. 740.

Richardson v. *Lowe;* 149 Fed. 625–628–631.

Ripley v. *Jackson, etc.*, 221 Fed. 209.

Gregg et al. v. *Megargel*, 254 Fed. 724–733.

Simon v. *Goodyear Metallic Rubber Shoe Co.*, 105 Fed. 573, 579, 580, 581.

In the last cited case it is made clear that the time for the injured party to act is when he discovers a

false representation has been made; the manner in which it was made it is immaterial if it was a false representation. It is stated at page 581:

> But full knowledge of a fraud does not mean that the party defrauded shall have knowledge of all of the evidence tending to prove the fraud. If he have knowledge of the material facts which go to make up the case of deceit as practiced upon him, it is sufficient to make him elect whether he will go on with the contract, or stop short and sue for the loss he has already suffered.

On page 580 it is stated:

> The fact that the defendant insisted upon performance, and that the plaintiff intended to perform, and then sue to recover the loss growing out of performance, can not alter the principle. The plaintiff was under no legal compulsion to go on. What he subsequently did was in execution of the contract. The deliberate execution of it was an adoption of it with knowledge of the deceit, and in contradiction of his purpose to sue for deceit practiced in its procurement.

Claimant having elected to continue the contract, knowing the nature of the materials to be dredged, has waived any right to assert a claim for damages on account of false representation. It elected to continue under the contract and therefore its only claim would be that it was compelled by the United States to perform work in addition to and not covered by the contract; it has made no showing of such case either in its petition or by the finding of

facts. The petition is entirely based upon misrepresentation inducing claimant to undertake a contract that it would not have undertaken but for such false representation. The issue is clear. There was or there was not false representation. If there was no false representation the case of course falls; if there was false representation, then claimant, by its actions in proceeding with the contract upon the discovery of that fact elected to be and is bound by the contract.

That there can be no question as to its election and that it is absolutely estopped is further shown by the subsequent contract made after the work had been in progress for more than two years. At that time, knowing all that was to be known about the character of the material to be dredged, and necessarily knowing of any misrepresentation, if any had been made, the claimant voluntarily entered into an additional or a supplemental formal contract in writing, the recitals in which show that it was made not because there had been any breach of duty on behalf of the Government, but for the express purpose of making the work which claimant had undertaken to do less difficult and less expensive to claimant. That in consideration of the advantage to it it agreed to accept a lesser compensation for the balance of the work. If there had been any misrepresentation in the inducement of the contract or any breach of duty whatever on the part of the Government up to that time, all was waived and claimant contracted

to complete the work under a contract satisfactory to it and of which it has not complained and as to which there is absolutely no claim of misrepresentation. Having done this claimant is bound. Even if misrepresentation existed in regard to the first contract, it could not disregard the second contract and rely upon some claim with reference to the first to relieve it from the obligation of the second. (*International Contracting Co.* v. *Lamont*, 155 U. S. 303, 309.) In that case the claim was that the second contract had been entered into under protest and yet relator was held bound by it. In fact the only way in which misrepresentation as to the first contract could be relied on would be to hold the second contract void. This is made clear by the court and it is stated (p. 309)—

> He entered of his own accord into the second contract and has acted under it and has taken advantages which resulted from his action under it, having received the compensation which was to be paid under its terms. Having done all this, he is estopped from denying the validity of the contract. (*Oregonian Railway* v. *Oregon Railway*, 10 Sawyer, 464.)

III.

BY THE FINDING OF FACTS AND THE ACT DEFINING ITS JURISDICTION, THE COURT OF CLAIMS, IF IT HAS JURISDICTION AT ALL, IS PRECLUDED FROM APPLYING THE MEASURE OF DAMAGES IT APPLIED IN THIS CASE.

Claimant's action, as shown by the petition, was for damages claimed to be due on account of having been induced to enter into a contract by false misrepresentations for the loss it claimed to have incurred. The Court of Claims finds (Finding VII, R. 31) that claimant actually expended in the prosecution of the work the sum of $354,009.19; it received from the defendants the sum of $142,959.10, making its loss on said contract the sum of $211,050.09. The judgment awarded was for this loss. The action was an action in deceit, and the judgment of the court shows that the damages awarded were the damages that are awarded by courts in such an action. For a claimant to maintain an action authorizing a judgment against the United States in the Court of Claims, its action must be founded on a contract express or implied. Claimant's action in this case and the judgment awarded by the court were both based, not upon the contract, but a tort. The petition alleges and the court necessarily holds by its judgment that the contract was absolutely void on account of fraud; therefore there was no contract and the action was for damages on account of the tort. The Court of Claims had no jurisdiction of this action and no authority to render a judgment on this ground.

Gibbons v. *United States*, 8 Wall. 269.
Morgan v. *United States*, 14 Wall. 531.

Schillinger v. *United States*, 155 U. S. 163.

Juragua Iron Co. v. *United States*, 212 U. S. 297.

Basso v. *United States*, 239 U. S. 602.

Ball Engineering Co. v. *White & Co.*, 250 U. S. 46.

In *Smith* v. *Bolles* (132 U. S. 125) it is stated (p. 129):

> The suit was not brought for breach of contract. The gist of the action was that the plaintiff was fraudulently induced by the defendant to purchase stock upon the faith of certain false and fraudulent representatives. * * * If the jury believed from the evidence that the defendant was guilty of the fraudulent and false representations alleged, * * * then the defendant was liable to respond in such damages as naturally and proximately resulted from the fraud.

This damage, as shown by this decision and many others, is the loss occasioned by a wrongful act. The Court of Claims has failed to distinguish this case, by its facts, from other cases where a claimant has been allowed to recover against the United States either because without any fault of his own, he was prevented from completing the contracts; or when, as in the Christie and other similar cases, extra work was required of the contractor for which the United States was responsible by warranty or otherwise. In these cases, while the judgment awarded is sometimes spoken of as damages, it is always for the amount to which the claimant is entitled in order to fairly compensate him for the work done, and can only be upon

the theory of *quantum meruit*. In *United States* v. *Behan* (110 U. S. 338) the claimant without fault of his own was prevented from carrying out his contract and the court states at page 345:

> When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he can not recover any damages for a breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meriut*. There is no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is, the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services.

The petition and finding of facts in the case at bar show clearly that claimant abandoned the work, that is, rescinded the contract, on the theory that a false representation had been made which entitled it to do so, and therefore it sued for its loss as damages. As shown by the last authority, this it could not do, even if it had been prevented by the United States, without its fault, from proceeding further with the contract, because it had rescinded it. What it did was to "elect to go for damages" on account of the tort, a false representation.

Where findings of fact are made upon which a judgment is predicated there must be some fact found to sustain each material element of the judgment. An important element of the judgment in

this case is the amount of the judgment. The finding of facts shows that the claimant in this case expended a certain amount and received a certain amount and that his loss (the amount of the judgment to which the court holds it entitled) is ascertained by deducting the amount claimant received from the amount which it spent. We submit that this is not enough. There is no finding that the amount it spent was necessarily required to do the work and no items whatever are set out to show how it was ascertained that it had spent $354,009.19. So far as is shown by the finding any portion of this amount might have been wasted; any portion might have been spent upon anything not essentially connected with the work. It may perhaps be said that taking the petition, the finding of facts, and the opinion of the majority of the court together, it may be inferred that the amount which the court finds claimant lost was expended by it on account of the claimed misrepresentation; but this should not be left to inference; it is an essential fact in the case necessary to be found and it certainly should be shown that the court found, as a matter of fact, that it had expended this amount, and all of it, in work necessarily connected with the performance of this contract and that the amount was properly chargeable against the United States on account of its misrepresentation. There could be no judgment in any amount, on this finding of facts on the ground of *quantum meruit*, for there is no showing at all as to what the dredging was reasonably worth, and the

finding of the court shows that it was not considering at all what the work was reasonably worth, but considered only claimant's loss. The loss, while it may be one of the facts to be considered in ascertaining the amount due under a claim for *quantum meruit*, is only one of the elements and is not determinative at all. If inference could be indulged in to supply an absolute omission of vital facts required to be found the only inference that arises is that the work in any event was reasonably worth far less than the amount claimant claims to have lost. The judgment of the court awards compensation at the rate of approximately 27 cents per cubic yard, for work which claimant contracted to do at 12.99 cents per cubic yard (and at a still less sum by the supplemental contract), the most difficult portion of which was actually completed by another contractor at approximately 16 cents per cubic yard.

CONCLUSION.

The record in this case affirmatively shows that claimant bound itself to perform certain work in the performance of which no unusual difficulties were encountered. It was for dredging a very large area of river bottom and the materials encountered were the materials ordinarily found in a river bottom, namely, mud, sand, and gravel, of different degrees of compactness. Plaintiff claims that it was led into this contract by a representation that the material to be dredged was *mainly* "mud, or mud with an admixture of fine sand," when it was

not *mainly* those materials. This representation was only an opinion or belief, and was honestly made, and was, therefore, no misrepresentation at all. The claimant had ample opportunity to investigate for itself, which opportunity it did not embrace. Its petition shows that it did not rely upon said representation absolutely as it must have done to recover, but knew that it was assuming a risk in doing so. It learned of the exact materials to be dredged as soon as it started to work; it continued work for over two years; it then entered into an additional contract for doing the work in regard to which no claim for misrepresentation was made; it still continued work under the contract and then abandoned the work; its only excuse for abandonment being, not that it did not know at that time the materials upon which it had been working for more than two years, but it then learned that the Government in making the tests upon which its opinion was based used a certain method; though it is shown that while the Government did not state that it had used any particular method in making the tests, that it had actually made the tests by the method exclusively used in the Delaware River.

Further, that claimant made a direct representation, upon which the Government had the right to rely, that it had full knowledge of the work required to be done; that the contract with claimant provided that it was to dredge all of the materials covered by the specifications at the price named in the contract,

except ledge rock; that the maps exhibited to it before it made its bid showed correctly that there were other materials to be dredged than "mud, and mud with an admixture of fine sand," and that the specification itself, to the effect that it was believed that the material was mainly as stated, of itself gave notice that there were other materials to be dredged which it, by its contract, contracted to dredge; that the facts absolutely failed to show any breach of duty on behalf of the United States which would authorize any recovery by claimant, and that the only default in this case is on its part. Further, that the finding of facts show that the majority of the Court of Claims entirely misconstrued the effect of the facts as found and misapplied the law upon the case as made. It is therefore asked that the judgment of the Court of Claims be reversed and the case remanded with directions to dismiss the petition.

Respectfully submitted.

FRANK DAVIS, JR.,
Assistant Attorney General.

JANUARY, 1920.

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 214.

UNITED STATES OF AMERICA,
Appellant,

vs.

ATLANTIC DREDGING COMPANY, W. B. BROOKS, AGENT,
Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE APPELLEE.

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INDEX.

PAGE

Statement of Case..... 1

The Law of the Case..... 11

The Question of Jurisdiction..... 22

Conclusion..... 25

TABLE OF CASES.

PAGE

Anvil Mining Co. vs. Humble, 153 U. S. 540.....13, 20

Behan vs. United States, 110 U. S. 347..... 19

Christie vs. United States, 237 U. S. 234..... 13

Hollerback vs. United States, 233 U. S. 165..... 13

United States vs. Spearin, 248 U. S. 132.....13, 14

United States vs. Utah, etc., Stage Co., 199 U. S. 414..... 13

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STATEMENT OF CASE.

This suit was instituted in the Court of Claims by the appellee, the Atlantic Dredging Company, against the United States to recover for losses sustained by it by reason of the breach on the part of the Government of a contract between the Government and the appellee (claimant below) for the dredging of a 35-foot channel in the Delaware River, below Philadelphia.

The claimant, in its petition, did not undertake to set forth its case with the technical formality of a declaration at common law, but did set forth a plain statement of the facts, without technical formality, and prayed for relief in a general manner, together with a detailed statement of its claims on alternative theories. (Paragraph 33 of Petition, Record, p. 7.)

In this paragraph of the Petition (Par. 33), plaintiff, in effect, makes claim for the damages sustained by it as the result of the misrepresentations made in the specifications—that is to say, the breach of the warranty as to the character of the material which the Government had encountered in the river bottom in making its test borings. The theory as to the measure of damages presented in this paragraph of the Petition may or may not be erroneous, but, in any event, the judgment actually given by the Court of Claims was safely within the rule of damages in such cases, because the judgment is for no more than the amount actually expended by the plaintiff under the contract, less the amount received from the Government, that being the measure of damages for breach of such contracts approved by this Court in the cases hereinafter cited.

In any event, no question as to the pleadings, or of any variance between the case as presented in the pleadings and that established by the evidence having been raised in the Court below by demurrer, exceptions to the evidence or otherwise, we must assume that this Court will consider the case "as presented by the facts" (found by the Court of Claims), just as that Court did, as indicated in the dissenting opinion of Chief Justice Campbell and Mr. Justice Downey, where they say: "It is not unusual for the Court to require the plaintiff to make more specific his petition. All of the Judges are agreed that it is within the power of the Court to require the plaintiff's case to be stated in the petition. In the instant case, which was not called to the Court's attention until

after all the proof was taken and it was submitted upon the petition and proofs, we must consider it as presented and determine *what is the case made by the facts.*" (Record, p. 42, italics ours.)

The case, as shown by the findings of fact of the Court below, taken in connection with the Petition and exhibits therein referred to, is substantially this:

On the 8th of October, 1912, the United States Government advertised for: "Sealed proposals for dredging in the Delaware River below Philadelphia * * * information on application." Bidders were invited to base their bids upon the specifications which had been prepared by and were submitted by the Government.

These specifications (Record, pp. 10-20) stated that the depth of the channel to be dredged was 35 feet, and under the heading, "Quality or Character of the Material," contained the following statements:

1. (Record, p. 16) "The material to be removed is believed to be mainly mud or mud with a mixture of fine sand, except from Stations 54 to 55 and 144, at the lower end of West Horseshoe Range (the latter not being included in this contract) where the material is firm sand and gravel, or cobbles"; and

2. "A number of test borings have been made in all of the area where dredging is to be done under these specifications, and the *results thereof may be seen by intending bidders on the maps on file in this office*" (Engineer's Office in Philadelphia).

Now, of course, this latter statement did not mean or amount to a guarantee that all of the material which the contractor might encounter in dredging in the area covered by this contract would necessarily be the same as that which the

Government had encountered in making the test borings (and this is specifically stated in the following paragraphs of the specifications), but it did mean that the maps to which the bidders were referred contained a truthful statement of the material which had been actually encountered by the Government in making the test borings, and a true record of the results of *all* the test borings which it had made.

These statements or representations were material, going to the very root of the contract, for the reason that the claimant had no knowledge of any facts upon which to base a judgment as to the probable character of the material to be dredged and the probable cost thereof, except the information contained in these specifications, and the maps therein referred to, and, as stated in the findings of fact (Record, p. 28): "made no inquiries as to the character of the material to be dredged except that given by the defendant on the maps above described." These representations, therefore, amounted to a warranty or condition.

The Court of Claims finds that these statements were untrue.

The maps to which bidders were referred and which the claimant examined before making its bid, and upon which its bid was based, did *not* show the results of all the borings which the Government had made. They showed the results of ten of those borings only, and that in six of them the material encountered had been "soft mud," in two of them "loose gravel," and in the other two "firm, sandy mud"; all indicating a comparatively easy job for the contractor; whereas two other borings had been made or attempted to be made by the Government, in which it had encountered material so difficult as to be impenetrable by the probe used in making the borings and recorded on the *field notes* at the time as "compacted sand and gravel, impenetrable," *but this record was never transferred to the maps shown to the bidders.*

To quote from the findings of fact (Record, p. 27):

"These 'test borings' were numbered consecutively, and, in the area embraced by the plaintiff's contract, were numbered from 111 to 120, inclusive. The record was kept of the result at each of said borings or probings, and the material indicated as being encountered by said method was correctly entered upon *field notes*. At several places in the entire area, and in two instances, numbered 113 and 114, in the area included in plaintiff's contract, the probe struck an impenetrable material and did not go down under the method used. The fact was correctly included in the *log or field notes* at the time. A tracing or tracings were then made upon which were correctly transcribed the data shown on the log or field notes, including the said information as to numbers 113 and 114, and other places where the probe had not penetrated. These tracings were forwarded to defendant's engineering office in Philadelphia. Subsequently, and in about *two months* after said *probings* were made, the said agents who made them repaired to the places where the probings had not penetrated, and made borings at those places by a method known as 'wash borings,' which consisted of inserting a cylinder in the soil below and applying a jet of water through a pipe, which would have the effect of bringing up the material below, and a correct record was made of the results of *these 'wash borings.'*" (N. B.—The material recorded as having been encountered in making these wash borings at Nos. 113 and 114 was described as "loose gravel"—made loose by the pressure of the "jet of water through a pipe.") "This record was also sent to the said engineering office. Thereafter, when the map exhibited with the specifications submitted to the bidders was made, it showed the result of said *probings*, as reported by the parties who made them and shown upon said tracings, *except at borings* 113 *and* 114, where the map showed the result of the 'wash borings,' as reported. The map *did not* show the result of the *probings* at borings 113 and 114."

Of course, if the map had shown the result of the probings which had been made, or attempted, at borings 113 and 114, it would have shown exactly what the field notes showed, to wit, that the Government's engineers had encountered at these points "compacted sand and gravel, impenetrable."

To quote again from the findings of fact (Record, p. 28):

> "The plaintiff, before executing the contract aforesaid, visited the office and examined the maps referred to in the specifications" (*ibid.*), and
>
> "There was nothing on the map exhibited to bidders showing the field notes taken at the time the borings were made."
>
> "The numbers of the borings covering that section of the Delaware River embraced in the contract of the plaintiff's were 111 to 120, inc.," and the record of the material encountered is as follows, as shown on the map:
>
> "111—Firm, sandy mud.
> "112—Firm, sandy mud.
> "113—Loose gravel.
> "114—Loose gravel.
> "115—Soft mud.
> "116—Soft mud.
> "117—Soft mud.
> "118—Soft mud.
> "119—Soft mud.
> "120—Soft mud." (Record, p. 28.)

All of the above showed the result of the probe down to below 35 feet, the depth of the channel which was to be dredged. Below this level, these borings indicated, in many cases, more difficult material, such as "hard gravel," etc., but, of course, we are not concerned in this case with the character of the material below the level to be dredged under the contract.

The findings then goes on to say:

> "The plaintiff did not examine the site of the work for itself before making its bid, and had no information and made no inquiries as to the character of the material to be dredged except that given by the defendant on the map above described." (Rec. p. 28.)

After which the Court says:

> "The legends on said map do not contain a true description of the material which was encountered by the plaintiff in the prosecution of the work." (Record, p. 29.)

And on page No. 30 the character of the material actually found at each of the borings in the neighborhood of which work was done by the claimant under the contract is set forth in detail; the dredging showing, in many cases, a large percentage of "sand and gravel," and this material encountered in the course of the doing of the work is described by the Government's engineer, in the Supplemental Agreement of the 4th of May, 1915 (Record, p. 24, Exhibit C), as:

> "Heavy and refractory material consisting mainly of compacted sand and gravel, with a small percentage of cobbles."

The actual contract which was based upon the specifications, and of which the specifications are made a part (Record, p. 20, Exhibit B), required the contractor to provide a plant suitable for doing the work—the dredging called for under the contract—which was to be approved by the Government's engineer.

> "The plant which was brought on the work by the plaintiff was inspected and approved by the defendant, and was efficient for dredging the character of the material which was mentioned in the specifications and described on the map to which the bidder was referred by the defendant for information. But was not efficient for dredging a material as was actually found." (Findings of Fact, Record, p. 29.)

It is evident, therefore, that the Government's own engineer was as much misled by the failure of the map to disclose the fact that heavy and refractory material, consisting mainly of "compacted sand and gravel, impenetrable," had

been encountered in making the test borings as was the contractor, else he would not have approved of such a plant, and it may be fairly inferred that the additional time required for the doing of the work, because of having a plant unsuitable for dredging such difficult material greatly increased the cost to the contractor and caused it to discontinue the work as soon as it found that it had a legal right to do so, instead of finishing the work and suing for the increased cost, as was done in the case of Christie vs. United States, hereafter referred to.

It further appears from the finding of facts (Record, p. 29) that:

> "After plaintiff or the concern it had employed had been at work for some time upon the said dredging, the plaintiff complained of the character of the material which was being encountered and, after some correspondence, a supplemental contract was entered into on May 4th, 1915, between the parties, relative to the prosecution of the work, and a copy of the supplemental contract is filed with the Petition herein, marked Exhibit C, and is made a part of the findings by reference."

In this Supplementary Agreement, which was approved by General Kingman, Chief of Engineers of the United States Army, it was stated:

> "It is found advantageous and to the best interest of the United States to modify the said contract (the original contract) as hereafter specified, for the following reasons:
>
> "That in the prosecution of the work under said contract, heavy and refractory material, consisting mainly of compact sand and gravel, with a small percentage of cobbles, has been encountered; that the deposit of the said heavy material in enclosed basins above high water is attended with extreme difficulty, calculated to delay the completion of the work; and that the deposit of said heavy material otherwise than in enclosed basins above high water will not be injurious to navigation.

> "Now, therefore, the said contract is by this Supplemental Agreement between Col. George A. Zinn, Corps of Engineers, United States Army, and the said contractor, on the 4th day of May, 1915, hereby modified in the following particulars, *but in no others.*"

And it then goes on to provide that:

> "All material excavated and removed under the sand contract, other than mud or mud with a mixture of fine sand, may be deposited in the Delaware River"

at certain points, instead of being deposited in enclosed basins above high water, in consideration of an abatement of two cents per cubic yard from the original contract price.

It is true, of course, as stated in the Government's brief, and so much urged in the dissenting opinion in the Court of Claims, that at the time of entering into this supplemental contract, the claimant was fully aware of the fact that the material which it was encountering in doing the dredging was very much more difficult than it had been led to expect that it would be from the representations made to it in the specifications and maps with reference to the material which had been encountered by the Government in making the test borings, and the idea pervading the dissenting opinion, as well as the Government's brief, on this point seems to be that, because the claimant did not discontinue the work upon making *this* discovery, but entered into a supplemental agreement, which reaffirmed the contract except in so far as it was modified thereby, it waived all right to claim compensation because of any misrepresentations contained in the specifications and maps.

But we submit that this is a totally erroneous view. For, as we have already seen from the quotations from the specifications (Sec. 27 thereof, Record, p. 16), the Government had not undertaken to make any statement as to what the material to be dredged over this area was. On the contrary, it had said: "No guarantee is given as to the correctness of these borings as representing the character of the bottom over

the *entire vicinity* in which they were taken, although the general information given thereby is believed to be trustworthy" (Record, p. 17), and therefore, even though all the material encountered by the claimant had proven to be "compacted sand and gravel, impenetrable," or even rock, the discovery of that fact would not have entitled it to abandon the work.

It took the risk that the material in other parts, or in all the other parts, of the bottom to be dredged would turn out to be different from the material encountered by the Government at the points at which it had made its test borings recorded on the map, and when it found that the judgment it had formed as to the character of the material which it would probably encounter, based upon the results of the test borings recorded on the map, was mistaken, it stuck to the work in most praiseworthy fashion, and continued its effort to complete the dredging, notwithstanding the heavy losses which it was sustaining in so doing.

But the Court below finds specifically: "At the time of making such supplemental agreement plaintiff was not aware of the manner in which the test borings over the area embraced in its contract had been made," and also that: "At the *time plaintiff had not been informed of the fact that impenetrable material had been reached by the probe, as aforesaid*" (Record, p. 30).

In other words, the plaintiff did not know at that time of facts which would have justified it at that time, or sooner, in abandoning the work, and the existence of which facts justified it in abandoning the work later on.

The findings of fact state that: "In or about the month of December, 1915, the plaintiff learned that the borings had been made by the probing method above mentioned. The plaintiff thereupon discontinued working under the contract, and declined to do further work"; claiming, in effect, that the nature of the information which the Government had based its estimate, and authorized the claimant to base its

estimate of the probable character of material to be dredged, had been misrepresented.

It further appears from the findings that: "At the time the plaintiff ceased work there remained approximately 350,000 cubic yards of material to be dredged in the area covered by the contract and that thereafter the work was completed under a contract with the American Dredging Company, whose bid for doing the same was 16 2/10c. per cubic yard," about 3 3/10c. per cubic yard above the price at which the plaintiff had contracted to do it.

The findings of fact conclude as follows:

> "7. B (ii). The plaintiff actually expended in the prosecution of the work the sum of $354,009.19. It received from the defendants the sum of $142,959.10, making its loss on said contract the sum of $211,050.09." (Record, p. 31.)

> "*Conclusion of Law.*
>
> "The Court, upon the foregoing findings of fact, decides, as a conclusion of law, that the plaintiff is entitled to recover the sum of $211,050.09. It is, therefore, adjudged and ordered that the plaintiff recover of and from the United States the sum of $211,050.09."
>
> (Record, p. 31.)

THE LAW OF THE CASE.

It is respectfully submitted that the conclusion thus reached by the Court of Claims, upon the facts found, was correct, and should be affirmed.

As already stated, this suit is in effect an action for the breach by the defendants of the contract between them and the claimant, or, to state it more specifically, of the warranty or condition contained in said contract, consisting of the representations made by the defendants in their specifications, which constituted a part of the contract, with respect to the information which it had received, as shown by the

maps, to which bidders were referred, in regard to the probable character of the material to be dredged, and also as to the grounds upon which it based its "belief" that the said material would be found to be "mainly mud or mud with a mixture of fine sand."

Conceiving that pleadings of technical formality were not requisite or customary in the Court of Claims, the claimant contented itself with a plain statement in its petition of the facts upon which its claim was based, so far as known to it at the time of instituting the suit, without technical formality—a course of procedure which, it is submitted, is sustained by this Court in the case of *United States vs. Behan*, 110 U. S. 347, where it is said:

> "The particular form of the petition in this case ought not to preclude the claimant from recovering what was fairly shown by the evidence to be the damages sustained by him. Though it is true that he does pray judgment for damages arising from loss of profits, yet he also prays judgment for the amount of his outlay and expenses less the amount realized from the sale of materials on hand. The claim for profits, if not sustained by proof, ought not to preclude a recovery of the claim for losses sustained by outlay and expenses. In a proceeding like the present, in which the claimant sets forth, by way of petition, a plain statement of the facts without technical formality, and prays relief either in a general manner, or in an alternative or cumulative form, the Court ought not to hold the claimant to strict technical rules of pleading, but should give to his statement a liberal interpretation, and afford him such relief as he may show himself substantially entitled to if within the fair scope of the claim as exhibited by the facts set forth in the petition."

Now, as already stated, the appellee's claim, as exhibited by the facts set forth in the Petition, was and is that the Government, as part of its contract with the appellee, made representations amounting to a warranty or condition to the effect: that it believed from the information which it

had received, as the result of the test borings which it had made, that the material to be dredged in the area covered by this contract was "mainly mud or mud with a mixture of fine sand," and that the appellee, before making its bid, could ascertain for itself the facts upon which this belief upon the part of the Government was based, by looking at the results of test borings appearing upon the maps, and that those maps contained a true record of the results of all the borings which the Government had made in this area.

Now, the Court of Claims finds, as already shown, that this representation was untrue, in that the maps did not show the results of all the test borings which had been made, and that, on the contrary, two borings had been made, the results of which did not appear upon the maps, and the results of which, if they had been recorded upon the maps shown to the bidders, would have disclosed the fact that material had been encountered by the Government in making its test borings in this area of a far more difficult character than that shown to have been found in the ten borings which had been recorded, *and would have disclosed the presence of the kind of material which was actually encountered later, when the work was being done under the contract.*

The Court below having found as a fact the making of this representation, and the further fact that it was not true, it is submitted that a state of facts is thus exhibited which clearly entitled the appellee to recover, as for a breach of warranty or condition, under the law, as settled by the decisions of this Court.

The decisions of this Court which would seem to cover the case at bar are as follows:

United States vs. Spearin, 248 U. S. 132;
Anvil Mining Co. vs. Humble, 153 U. S. 540;
United States vs. Utah, etc., Stage Co., 199 U. S. 414;
Hollerback vs. United States, 233 U. S. 165;
Christie vs. United States, 237 U. S. 234.

The fact of misrepresentation in the case at bar was discovered in this case after a great deal of the work under the contract had been done by the appellee, and after large amounts of money had been expended by it in doing this work, but before the actual completion of all that the contract called for, the appellee having stopped further work immediately upon discovery that a misrepresentation had been made.

The appellee contends that it was justified in refusing to go on with the work when it discovered that the Government had failed to disclose upon the map to which bidders were referred two borings which had been made by it within that portion of the river covered by the contract in question, when it was definitely and specifically representing that the map showed the result of the borings which had been made by the Government; that *from the inception of the contract* it was a condition of it, that any statement or representation in relation to anything done for the purpose of ascertaining the character of the material to be dredged was in its very nature a material and essential statement or representation, and that its falsity, whether resulting from design or accident, gave the appellee the right to stop work and sue as for the breach of the contract.

In the case of *United States vs. Spearin*, 248 U. S. 132, Spearin entered into a contract with the Government for the erection of a drydock upon a designated site. The contract called for the relocation and reconstruction of a 6-foot brick sewer which intersected the site where the drydock was to be located. This relocated sewer was to be built in accordance with plans and specifications furnished by the Government, which Spearin accordingly followed, and the work was approved by the Government. Later during the progress of the work of excavating for the drydock there occurred a sudden and heavy downpour of rain coincident with a high tide, which forced the water up the sewer for a considerable dis-

tance, causing internal pressure, which broke the reconstructed sewer at several places and flooded the excavation of the drydock. Investigation disclosed that the flooding was caused by a dam in another sewer called the 7-foot sewer, into which the new sewer built by Spearin emptied. Both sewers were a part of the city sewerage system; but the dam was not shown either on the city's plan, nor on the Government's plans and blue prints which were submitted to Spearin. *On them the 7-foot sewer appeared as unobstructed.* The Government officials concerned with the letting of the contract and construction of the drydock did not know of the existence of the dam. The site selected for the drydock was low ground, and during some years prior to making the contract sued on the sewers had from time to time overflowed to the knowledge of these officials and others. But the fact had not been communicated to Spearin by anyone. He had before entering into the contract made a superficial examination of the premises and sought from the civil engineer's office at the Navy Yard information concerning the conditions and probable cost of the work; but he had made no special examination of the sewers, nor special inquiry into the possibility of the work being flooded, and had no information on the subject.

Promptly after the breaking of the sewer Spearin notified the Government that he considered the sewers under existing plans a menace to the work, and that he would not resume operations unless the Government either made good or assumed responsibility for the damage that had already occurred and either made such changes in the sewer system as would remove the danger, or assumed responsibility for the damage which might thereafter be occasioned by the insufficient capacity and the location and design of the existing sewers. It was unsafe to both Spearin's and the Government's property to proceed with the work with the 6-foot sewer in its then condition. The Government insisted that the responsibility for remedying existing conditions rested

with the contractor. After fifteen months spent in investigation and fruitless correspondence, the Secretary of the Navy annulled the contract and took possession of the plant and materials on the site (pp. 133-135).

Upon these facts, Spearin was held by this Court to be entitled to recover so much of his proper expenditures upon the work plus $60,000, representing the profit he would have made had he completed the work.

The ground for this decision is thus stated in the opinion:

> "Where one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered. *Day vs. United States*, 245 U. S. 159; *Phœnix Bridge Co. vs. United States*, 211 U. S. 188. Thus one who undertakes to erect a structure upon a particular site assumes ordinarily the risk of subsidence of the soil. *Simpson vs. United States*, 172 U. S. 372; *Dermott vs. Jones*, 2 Wall. 1. But if the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. *MacKnight Flintic Stone Co. vs. The Mayor*, 160 N. Y. 72; *Filbert vs. Philadelphia*, 181 Pa. St. 530; *Bentley vs. State*, 73 Wisconsin, 416. See *Sundstrom vs. New York*, 213 N. Y. 68. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work, as is shown by *Christie vs. United States*, 237 U. S. 234; *Hollerback vs. United States*, 233 U. S. 165, and *United States vs. Utah, etc., Stage Co.*, 199 U. S. 414, 424, where it was held that the contractor should be relieved if he was misled by erroneous statements in the specifications.
>
> "In the case at bar, the sewer, as well as the other structures, was to be built in accordance with the plans and specifications furnished by the Government. The construction of the sewer constituted as much an integral part of the contract as did the construction of any part of the drydock proper. It was as necessary as any

other work in the preparation for the foundation. It involved no separate contract and no separate consideration. The contention of the Government that the present case is to be distinguished from the *Bentley Case, supra,* and other similar cases, on the ground that the contract with reference to the sewer is purely collateral, is clearly without merit. The risk of the existing system proving adequate might have rested upon Spearin, if the contract for the drydock had not contained the provision for relocation of the 6-foot sewer. But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor to examine the site, to check up the plans, and to assume responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent inquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract."

It will be observed that this Court in the *Spearin Case* held that the representation that the plans and specifications were sufficient if complied with to accomplish the thing which the contract contemplated, constituted a warranty, and that Spearin had a right to enter into the contract in reliance upon the represented sufficiency of the plans and specifications prescribed by the Government to accomplish the results mentioned in the contract. And it was further held that when this warranty of sufficiency had been broken by the Government, that Spearin had a right to discontinue the work under the contract and sue for its breach.

It is to be observed that the estimated cost of restoring the sewer in that case was but $3,875.00—a very small item proportionally in a transaction involving $757,800.00. Indeed, the Government contended that "the contract with reference to the sewer is purely collateral."

But this Court held that:

> "The construction of the sewer constituted as much an integral part of the contract as did the construction of any part of the drydock proper" (p. 136).

The right to stop work without forfeiting all right to recover for the breach of warranty was recognized expressly by this Court in the *Spearin Case*. There the Government was properly asked to assume the damage which had resulted by the breach of warranty, and upon its refusal to do so the contractor was relieved from further obligation to proceed with the work.

Upon this point the Court said:

> "The breach of warranty, followed by the Government's repudiation of all responsibility for the past and for making working conditions safe in the future, justified Spearin in refusing to resume work. He was not obliged to restore the sewer and to proceed at his peril, with the construction of the drydock. When the Government refused to assume the responsibility, he might have terminated the contract himself. *Anvil Mining Co. vs. Humble*, 153 U. S. 540, 551-552; but he did not. When the Government annulled the contract without justification, it became liable for all damages resulting from its breach."

It is not necessary to review in detail the *Christie, Hollerbach and Utah, etc., Stage Co. cases, supra*. Each of these cases is clear upon the point that where a material representation is made in the contract, or in the specifications which are a part of the contract, and such a representation turns out to be untrue, the injured party has a right to recover the damages resulting from such misrepresentation. The *Chris-*

tie Case and the *Hollerbach Case* both involved representations as to the character of the work to be done, and clearly establish that such representations are material. The point which those cases did not decide, which is involved here, is what are the rights of the contractor in such a case with respect to *stopping work*. In both those cases and in the *Utah Stage Co. Case*, the contractor completed his work under the contract, and claimed an additional amount for damages arising out of the misrepresentations.

It, therefore, becomes important in the case at bar, to show what are the rights of the contractor where he stops work by reason of a material misrepresentation. The *Spearin Case* has been discussed at such length because it is controlling upon this proposition. It makes clear that in the case of a breach of warranty or condition, which relates to the character of the work to be done, that such a breach goes to the root of the contract, and justifies the contractor in stopping work. It further holds that in such an event the contractor does not lose his rights under the contract, but may sue for its breach and recover the amount of his outlay, plus such profit as he would have made had he completed the work.

In the *Spearin Case*, there is cited the case of *Anvil Mining Co. vs. Humble*, 153 U. S. 540, which is particularly important in view of some confusion which has arisen by the use of certain language in the case of *United States vs. Behan*, 110 U. S. at page 345, as follows:

> "When a party injured by the stoppage of a contract elects to rescind it, then, it is true, he cannot recover any damages for the breach of the contract, either for outlay or for loss of profits; he recovers the value of his services actually performed as upon a *quantum meruit*. There is then no question of losses or profits. But when he elects to go for damages for the breach of the contract, the first and most obvious damage to be shown is the amount which he has been induced to expend on the faith of the contract, including a fair allowance for his own time and services * * * ."

It will be noted that the Court says that, "when a party *injured* by the *stoppage* of a contract elects to rescind it," then his recovery is upon the *quantum meruit*. The exact situation which the Court had in view when this language was used is not entirely clear, but evidently the Court had in contemplation a case of *a technical rescission of the contract*. The authorities are clear that a mere stoppage of the work or an abandonment of a contract, when this is *justified* by some breach of the contract by the other party, does not work a rescission of the contract in the sense that no right of action can be asserted thereunder by the party who was compelled by the act of the other party to abandon the fulfillment of the contract. To permit this would in effect allow one party by his own wrongdoing to at any time put an end to a contract.

The case of *Anvil Mining Co. vs. Humble*, 153 U. S. 540, lays down the correct rule upon this question, to the effect that where one party abandons work under a contract *as a result of a breach of the same by the other party*, the right of the innocent party to sue under the contract for its breach remains unimpaired.

The Court in that case, in passing upon an instruction granted by the lower Court, said (pp. 551-552):

> "It is insisted and authorities are cited in support thereof, that a party cannot rescind a contract and at the same time recover damages for his non-performance. But no such proposition as that is contained in that instruction. It only lays down the rule, and it lays that down correctly, which obtains when there is a breach of a contract. Whenever one party thereto is guilty of such a breach as is here attributed to the defendant, the other party is at liberty to treat the contract as broken and desist from any further effort on his part to perform; in other words, he may abandon it, and recover as damages the profits which he would have received through full performance. *Such an abandonment is not technically a rescission of the contract*, but is merely an acceptance of the situation which the

wrongdoing of the other party has brought about. Generally speaking, it is true that when a contract is not performed the party who is guilty of the first breach is the one upon whom rests all the liability for the non-performance. A party who engages to do work has a right to proceed free from any let or hindrance of the other party, and if such other party interferes, hinders, and prevents the doing of the work to such an extent as to render its performance difficult and largely diminish the profits, the first may treat the contract as broken, and is not bound to proceed under the added burden and increased expense. It may stop and sue for the damages which it has sustained by reason of the non-performance which the other has caused." (Italics ours.)

Now, in the case at bar, it is submitted that upon the same principle, when it is found that at the time when the plaintiff, the contractor, refuses to go on with the work and abandons the contract, that there had been a breach on the part of the Government of a most essential part of that contract, in that the representations and statements made by the defendants, as to the results of the test borings and the nature of the information on the strength of which they had based the belief which they had expressed, as to the character of the material in the river bottom, were untrue, the contractor was clearly entitled to abandon the work, which abandonment would not be a rescission, such as to disentitle it to recover for its breach against the defendants.

The effect of the warranty had been to cause the plaintiff to undertake a piece of work which it might otherwise never have undertaken at all, and certainly not have undertaken to perform with a plant and equipment not suited for the dredging of such difficult material as "compacted sand and gravel" and other difficult and refractory material such as was actually encountered and might have been *anticipated* as the result of *all* the borings, *had they been disclosed to it at the time of making its bid.*

The breach of this warranty on the part of the defendants rendered the performance of the work extremely difficult and removed the possibility of any profit, and it would seem, therefore, that under these circumstances, upon the authorities already quoted, the plaintiff may treat the contract as broken, and is not bound to proceed under the added burdens and increased expense. It may stop and sue for the damage which it has sustained by reason of the non-performance which the other has caused.

The Question of Jurisdiction.

The contention is made, or attempted to be made, on the part of the Government in its brief, that this is an action sounding in tort, so that the Court of Claims has no jurisdiction.

It is submitted that there is nothing in this case to justify such a contention. It may be that the claim for damages made by the claimant in its Petition is wider in its scope than can be allowed in an action other than an action for deceit.

But there is no charge of fraud made in the Petition, and there is no finding of the perpetration of any fraud on the part of the Government in the findings of fact. It is true that it is charged in the Petition that the Government made certain misrepresentations; that it stated that it had made borings when, in point of fact, it had only made what ought properly to be called soundings; that it stated it had a belief when, in point of fact, it was making a mere guess, and the Court of Claims finds as a fact that the statement to the effect that the map exhibited to the bidder showed the results of all the borings the Government had made was not true, but there is no allegation and no attempt at proof or any evidence at all that any of these misstatements were made with a fraudulent purpose or for the object of misleading and cheating the contractor.

In order to establish a fraud on the part of the Government in cases of this kind, it would be necessary to allege and prove that Col. Kuhn, who advertised for bids on behalf of the Government, and exhibited the specifications and maps to them, had knowledge of the fact that these maps did not reveal the results of all the borings and did not, therefore, constitute a true record of all the information which the Government had in making the statement to the contractor of its belief in regard to the character of the material to be dredged, whereas there is no such allegation and no such proof or attempt at proof. There is no reason for doubting that the statements made by Col. Kuhn were made in perfect good faith, nor is there any charge or proof or attempt at proof that the failure of the subordinate officials, whoever they were, to transfer the result of the borings first made at Nos. 112 and 113, where they struck impenetrable material, compacted sand and gravel, to the map shown to the bidder was intentionally or fraudulently done, rather than accidentally, owing to, as in the case of *Christie vs. United States, supra*, the supposition that it was not necessary to do so.

The Government's Contention Examined.

It is submitted that the defenses set up in the appellee's brief do not by any means meet the case made by the facts. It may be said to establish the proposition that one of the allegations made in the Petition—that is to say, one of the misrepresentations alleged to have been made—was not found by the Court of Claims to have been proven, viz, the statement that the Government had made no "borings," but only "soundings," in the area to be dredged under the contract.

It is true that the Court of Claims finds that according to the practice prevailing on the Delaware River, at any rate, the probings made by the Government in testing the character of the bottom were properly designated as borings, and

that there are two classes of borings—core borings and wash borings—by both of which methods actual specimens of the material in the various depths of the bottom would have been brought up; but the brief does not meet the vital fact, established by the undisputed evidence and found by the Court of Claims as a fact, that the map to which bidders were referred for information regarding the probable character of the material to be dredged, under the contract, and for an inspection of the borings which the Government had made, was utterly misleading, in that it failed to inform them that two other borings, in addition to the ten appearing on the map, had been made, as a result of which compacted sand and gravel, impenetrable, had been encountered.

Neither does the brief meet the charge made in the Petition, and established by the evidence, that the facts in possession of the Government (although, of course, not all of them were known to the contracting officer who invited the bids and made the contract) did not justify the statement of a belief on the part of the Government that the material to be dredged was "mainly mud or mud with a mixture of fine sand," except in a place not covered by this contract, where it is stated positively to be "firm mud, sand and gravel or cobbles."

Certainly, that statement, taken in connection with the ten borings referred to on the map, undoubtedly meant that *so far as the Government knew*, or had any reason to believe, that the material in the area to be dredged under this contract was either "soft mud," as indicated by six of the borings; "loose gravel," as indicated by two, or "firm, sandy mud," as indicated by the other two borings, and that there was no indication anywhere of the existence of compacted sand and gravel.

And that statement was undoubtedly untrue, unless we assume that the appellant—that is to say, the United States Government—is not to be charged with the knowledge which the men who made these probings at 113 and 114, and entered

the results upon the field notes, as "compacted sand and gravel, impenetrable," had.

Certainly, no one would imagine for a moment, from what the Government stated in its specifications that it had any reason to believe, as the result of any investigation which it had made, that there was any likelihood that the contractor would encounter any such material as compacted sand and gravel in the area to be dredged under this contract.

It is not believed for a moment that the United States Army officer who invited these bids and made those representations would have made them if he had had knowledge of the fact that material had been encountered in the making of the test borings which was not shown on the map.

The misrepresentations, therefore, while vitally material, were entirely innocent and entirely free from any purpose to defraud on the part of the Government, and could not, in any event, be made ground for an action of deceit or tort of any kind.

Conclusion.

In conclusion, it is respectfully submitted that the allowance made by the Court of Claims to the contractor in this case was, to say the least, most conservative, being confined to the amount actually expended by it in money, less the amount received from the Government, and excluding entirely his claims for the use of his plant, "overhead" expenses, etc., during the long period over which the work was done, and that the judgment of the Court of Claims should be affirmed.

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Baltimore, March 1st, 1920.